

Before The
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

PROCEDURES RELATED TO
COMMISSION VIEWS

Docket No. RM2015-14

**UNITED STATES POSTAL SERVICE COMMENTS
ON PROCEDURES RELATED TO COMMISSION VIEWS
(August 27, 2015)**

Pursuant to Order No. 2602, the United States Postal Service (Postal Service) hereby provides its comments with respect to proposed rules regarding the Postal Regulatory Commission (Commission) providing its views to the Secretary of State on proposals before the Congress of the Universal Postal Union (UPU) that could affect market dominant rates or classifications.

BACKGROUND

On July 21, 2015, the Commission issued Order No. 2602 proposing new regulations regarding the process by which the Commission provides its views to the Secretary of State on proposals before the Congress of the UPU that could affect market dominant rates or classifications. Pursuant to 39 U.S.C. § 407(c)(1), before concluding any treaty, convention, or amendment that establishes a rate or classification for a market dominant product, the Secretary of State is required to request the Commission to submit its views on whether such rate or classification is consistent with the standards and criteria established by the Commission under section 3622. Previously, the Secretary of State requested the Commission's views on proposals for the 2008 and 2012 UPU Congresses. The Commission subsequently transmitted such comments. In 2012, as part of the Commission's process for

developing its views, it established a public inquiry docket, PI2012-1, to solicit comments on the general principles that should guide the development of its views in response to the anticipated request from the Secretary of State. The proposed regulations in Order No. 2602 seek to formalize this process and provide timeframes and mechanisms for the Commission to seek public comment and submit its views to the Secretary of State.

ANALYSIS

The Postal Service finds that the proposed definition of “Modern rate regulation” in the proposed subsection 3017.1(a), if interpreted as it has been in the past, derogates from the Commission’s statutory authority and may result in confusion for members of the public and unnecessary work for those submitting comments to the Commission. As such, the Postal Service urges that this definition be clarified to ensure that comments received pursuant to these proposed rules are beneficial to the Commission and do not extend beyond the scope of the Commission’s views as clearly delineated by 39 U.S.C. § 407(c)(1).

These comments (1) set forth the background of the Commission’s statutory authority; (2) examine the current standards and criteria the Commission has established pursuant to 39 U.S.C. § 3622; (3) detail past practice as it relates to the Commission’s views presented to the Secretary of State; and (4) offer an alternative definition of “Modern rate regulation,” which would ensure that the Commission’s views offered to the Secretary of State pursuant to these rules are in accordance with current statutory authority.

1. The Commission's Authority Under 39 U.S.C. § 407(c)(1)

Pursuant to 39 U.S.C. § 407(c)(1), “[b]efore concluding any treaty, convention, or amendment that establishes a rate or classification for a product subject to subchapter I of chapter 36, the Secretary of State shall request the Postal Regulatory Commission to submit its views on whether such rate or classification is consistent with the standards and criteria established by the Commission under section 3622.” As the Commission acknowledges in Order No. 2602, the views submitted by the Commission to the Secretary of State are limited to those that establish “a rate or classification for a product subject to subchapter I of chapter 36”, that is, market dominant products.

The statute must be broken down into its substantive parts to best analyze the obligations and roles set forth. First, there must be an applicable treaty, convention or amendment involved that relates to the establishment of a new rate or classification. Second, the rate or classification must impact a market dominant product.¹ Third, the Secretary of State must request the views of the Commission as to whether or not such new rates or classifications are consistent with the criteria the Commission has established pursuant to 39 U.S.C. § 3622. And fourth, the Commission must decide whether to provide such views to the Secretary of State.

These comments focus on the third and fourth items above, namely the role of the Commission when presenting its views as to the consistency with the standards and criteria the Commission has established pursuant to 39 U.S.C. § 3622.

¹ There is no specified role for the Commission with respect to competitive products established through a treaty, convention, or amendment.

2. The Current Standards and Criteria Established by the Commission Pursuant to 39 U.S.C. § 3622

Subsection (a) of section 3622 of title 39 requires the Commission, within 18 months of the enactment of the PAEA, to establish by regulation, a modern system for regulating rates and classes for market-dominant products. In establishing such regulations, the Commission was directed by statute to design a system to achieve nine objectives, applied in conjunction, as set forth in 39 U.S.C. § 3622(b). In addition, 39 U.S.C. § 3622(c) provides fourteen factors for the Commission to take into account when establishing or revising its system for regulating rates and classes for market-dominant products.

Pursuant to this authority, the Commission initiated PRC Docket No. RM2007-1, Regulations Establishing a System of Ratemaking. This docket spanned a time period of more nine months in 2007 and included comments from more than a dozen parties.² Ultimately, the Commission issued Order No. 43 and adopted part 3010 of title 39 of the Code of Federal Regulations, “Regulation of Market Dominant Products,” and part 3020 of title 39 of the Code of Federal Regulations, “Product Lists.”

Part 3010 establishes the rules for regulating rates on market dominant products, and defines rates of general applicability. Part 3010 identifies adjustments to rates of general applicability as “Type 1” adjustments.³ Although not set forth in the rules explicitly, the Commission has noted that rates set through the UPU, including terminal

² See Docket No. RM2007-1.

³ Part 3010 defines “Type 2” adjustments as rate adjustments to negotiated service agreements and “Type 3” adjustments as rate adjustments in exceptional or extraordinary circumstances.

dues and inward land rates, are rates of general applicability under part 3010.⁴ Likewise, changes in these rates by the UPU system might be analogized as a Type 1 rate adjustment, although the Commission has not decided the issue directly.⁵ For a Type 1 rate adjustment, the Commission specifically has established the standards upon which it will review such adjustments in 39 C.F.R. § 3010.11(d). There, the Commission identifies that it will determine whether the rate adjustment is consistent with the requirements in 39 C.F.R. §§ 3010.21 and 3010.22 and the statutory requirements in 39 U.S.C. §§ 3626, 3627, and 3629. The Commission has not included the objectives and factors in 39 U.S.C. §§ 3622(b) and (c) in its analysis, as these are merely the factors and objectives for *developing* the modern rate system.

Part 3020 establishes the rules for Postal Service products and the classification of those products. With respect to the Commission review process of UPU proposals, however, part 3020 is rarely applicable. UPU proposals reviewed by the Commission rarely relate to classification changes for market dominant products. Instead, they generally relate to rate setting, which is outlined above with respect to part 3010. Thus, the Commission usually does not need to concern itself with a review of the standards and criteria in part 3020 when issuing its views to the Secretary of State.⁶ To date, those regulations described above in part 3010, as related to issues of rates, and part 3020, as related to issues of classification, are the only regulations issued by the

⁴ See Order No. 675 at 19-21.

⁵ Whether it would be a Type 1-A, B, or C rate adjustment would depend on the circumstances, but this is irrelevant to the analysis presented here.

⁶ Should a UPU proposal raise a classification change for a market dominant product, the Commission may, pursuant to part 3020, review consistency of that change with the objectives and factors of 39 U.S.C. §§ 3622 (b) and (c).

Commission which set forth the current criteria and standards for market dominant products to be considered by the Commission in developing its views.

Thus, when reviewing issues related to rates, commenters in future public inquiry dockets should focus remarks on how potential proposals will impact the Postal Service's rate authority as set forth in part 3010, including impacts on the price cap and, to the extent applicable, workshare discounts as set forth in 39 U.S.C. §§ 3622(d) and (e). For any issues related to classification, commenters should focus remarks on how proposals must comply with the requirements in part 3020. Such a focus will generally provide more clarity and specificity for commenters and when the Commission provides its views to the Secretary of State. The proposed changes to the definition of modern rate regulation set forth in section 4 below seek to achieve those goals.

3. Past Practice in Interpreting 39 U.S.C. § 407(c)(1)

In Docket No. PI2012-1, the Commission solicited comments “on the principles that should guide development of its views on the consistency of proposals for ‘rates and classification of products subject to subchapter I of chapter 36’ with the standards and criteria of 39 U.S.C. § 3622.”⁷ On reflection, this solicitation, while closely related to the statute, exceeded the scope of the statutory language. It thereby resulted in commenters committing more effort than necessary. Specifically, the request in Docket No. PI2012-1 did not differentiate between the *standards and criteria* of 39 U.S.C. § 3622 and those *established* by the Commission pursuant to 39 U.S.C. § 3622.

⁷ Docket No. PI2012-1, Order No. 1420 at 3 (July 31, 2012).

A review of the comments received in Docket No. PI2012-1 demonstrates that commenters responded to the order with content that included far more than just the “standards and criteria” established by the Commission. Nearly all commenters focused their attention in their comments to the factors and objectives in 39 U.S.C. § 3622 rather than the standards and criteria established by the Commission in parts 3010 and 3020. For example, on pages 2 and 3 of its reply comments, FedEx discussed how the Commission should express its views about making sure “the Convention [is] consistent with the standards and criteria of Section 3622.”⁸ The Public Representative likewise focused on cost coverage, which is one of the 39 U.S.C. § 3622(c) factors, and not the standards and criteria *established by the Commission* in parts 3010 and 3020.⁹

After reviewing the comments in Docket No. PI2012-1, the Commission issued its views to the Secretary of State on September 12, 2012. Based on the original notice for comments and the responses from commenters, it appears that the Commission analyzed the UPU proposals with respect to the factors and objectives of 39 U.S.C. § 3622 instead of the standards and criteria established by the Commission in parts 3010 and 3020. Upon reflection, and with the benefit of the experience from the Doha Congress preparations, the Postal Service submits that such an approach is counter to the plain language of 39 U.S.C. § 407(c)(1), which provides that the Commission should express its views only on consistency with “the standards and criteria established by the Commission under 39 U.S.C. § 3622.”

⁸ Docket No. PI2012-1, Reply Comments of Federal Express at 2-3 (August 31, 2015).

⁹ Docket No. PI2012-1, Public Representative Comments (August 27, 2012).

For example, with respect to Proposal 20.27.1, which related to rate increases in the terminal dues system, the Commission found the proposal “consistent with 39 U.S.C. § 3622 as it improves cost coverage and creates rate stability.” As this proposal related to rates and not classification, analyzing whether the proposal was consistent with the standards and criteria that the Commission has established in part 3010 would, in the Postal Service’s view, have been the correct measure of the proposal’s soundness. Such an analysis would have resulted in a view that the proposal was consistent with the standards and criteria in part 3010 because it would not cause the Postal Service to exceed its rate authority as established by the Commission. For such proposal, the Commission’s rules set forth the standard of Commission review as “calculated under §3010.21 or §3010.22, as applicable, the limitation set forth in §3010.29, and 39 U.S.C. 3626, 3627, and 3629.” 39 C.F.R. § 3010.11(d). Under such an analysis, the proposal would certainly have been consistent with the standards and criteria established by the Commission because it would not have increased rates beyond the statutory or regulatory limits. No examination of the factors and objectives of 39 U.S.C. § 3622 is necessary, and, in fact, such examination is outside the scope of the Commission’s review under part 3010.

Ultimately, it appears that the approaches undertaken in advance of the Doha Congress in 2012 resulted in more work and analysis for commenters, the Public Representative, and the Commission. More clarity is necessary to ensure that the process and results of Docket No. PI2012-1 are consistent with the Commission’s statutory authority and that the comment process is focused, transparent, and appropriately tailored to satisfy the statutory requirement. To accomplish these goals,

the Postal Service urges, as set forth in section 4 below, that amending the definition of modern rate regulation in these proposed regulations would be optimal and consistent with the statutory language.

4. Appropriate Definition of Modern Rate Regulation

These proposed rules would define “Modern rate regulation” as “the standards and criteria the Commission has established pursuant to 39 U.S.C. § 3622,” which is identical to the statutory language of 39 U.S.C. § 407(c)(1). As has been explained above, however, the scope of the Commission’s view under this statutory requirement has shifted beyond the plain reading of the statute to include an analysis of all of the objectives and factors of 39 U.S.C. § 3622 for proposals to be considered at a future UPU Congress. In order for the Commission to provide comments pursuant to its statutory mandate, a clearer definition, which more closely aligns with the current regulatory structure, is more appropriate. Such clarity will benefit all parties involved by focusing the input from members of the public and the Commission to those issues that Congress and the Commission intended to make relevant.

In order to achieve the stated objective of 39 U.S.C. § 407(c)(1), the Postal Service proposes that the definition of “Modern rate regulation” be amended to read “*Modern rate regulation* refers to the standards and criteria that the Commission has established in 39 C.F.R. part 3010 with respect to rates and part 3020 with respect to classification pursuant to its authority in 39 U.S.C. § 3622.” Such a definition unambiguously identifies the standards and criteria established by the Commission as being found in part 3010 for UPU proposals related to rates and to part 3020 for UPU proposals related to classification. This focuses commenters to the relevant regulations

on which the Commission will provide its view to the Secretary of State. Using this definition, members of the public may now present their comments on the general principles that should guide the Commission in its views in response to a request from the Secretary of State, without consuming time and resources on extraneous issues outside the scope of 39 U.S.C. § 407(c)(1).

CONCLUSION

Based upon the foregoing, the Commission should amend its current definition of “Modern rate regulation” as proposed by the Postal Service to ensure that its actions conform to its current statutory authority with respect to the Commission offering its views to the Secretary of State. Such a definition will provide members of the public greater clarity on the role of the Commission in providing its views to the Secretary of State and allow members of the public to focus their comments on those issues that are within the scope of the Commission’s views.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Anthony F. Alverno
Chief Counsel
Global Business & Service Development

Keith C. Nusbaum

475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1137
(202) 268-6687; Fax -0251
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